

Achieving Reproductive Justice in the International Surrogacy Market

Seema Mohapatra, J.D., M.P.H.*

Men and women are increasingly seeking surrogacy arrangements outside of their home country, mainly due to legal restrictions or the high cost of surrogacy in their home countries. Global surrogacy raises numerous issues including the economic status of women involved in surrogacy arrangements, poverty, issues related to what motherhood means and how women from different ethnic, socioeconomic, class, and national backgrounds interact in the global surrogacy market. This essay briefly analyzes whether reproductive justice exists in the current international surrogacy market.

I. WHAT IS REPRODUCTIVE JUSTICE?

Reproductive justice refers to the normative concept that all women, regardless of their ethnic, racial, national, social, or economic backgrounds, should be able to make healthy decisions about their bodies and their families.¹ Rather than using a traditional lens of analyzing assisted reproductive technologies (“ART”) and surrogacy using the tools of liberal feminism (such as focusing on a woman’s individual autonomy), the

* Assistant Professor of Law, Barry University School of Law, Orlando, Florida. B.A., Johns Hopkins University, M.P.H., Yale University, J.D., Northwestern University School of Law. I would like to thank Judith Daar, Paul Lombardo, and the participants of the Junior Faculty Workshop at the 2011 American Society of Law and Medicine Health Law Professors Conference at the Loyola University School of Law for their helpful insight in developing my surrogacy research. This Article is based upon my presentation at ASLME Conference and is one in a series of Articles in which I explore legal and ethical issues related to international surrogacy. See Seema Mohapatra, *A Tale of Many Cities: Using Bioethics to Deconstruct Baby Stories From the Wild World of International Surrogacy*, BERKELEY J. INT’L L., (forthcoming Spring 2012). See also Seema Mohapatra, *A Race To The Bottom? The Need For International Regulation Of The Rapidly Growing Global Surrogacy Market?*, GESTATIONAL SURROGACY AND THE WOMB INDUSTRY IN INDIA (Eds. S. DasGupta & S. Dasgupta) (forthcoming 2012) (analyzing this issue using different Western and Indian feminist theories and an intersectional lens).

1. See Loretta J. Ross et al., *The “Sistersong Collective”: Women of Color, Reproductive Health and Human Rights*, 17 AM. J. HEALTH STUD. 79, 79 (2001); ASIAN COMMUNITIES FOR REPRODUCTIVE JUSTICE, A NEW VISION FOR REPRODUCTIVE JUSTICE (2005), <http://reproductivejustice.org/assets/docs/ACRJ-A-New-Vision.pdf>.

reproductive justice framework goes beyond the individual woman.² The framework acknowledges that each woman is part of a family and community, and aims to support policies that aid entire families and communities in order to support these women.³ The reproductive justice framework “integrate[s] the concepts of reproductive rights, social justice and human rights.”⁴ Reproductive justice proponents try to “achieve the complete physical, mental, spiritual, political, social, and economic well-being of women and girls, based on the full achievement and protection of women’s human rights.”⁵ The reproductive justice movement aims to address reproductive concerns faced by women outside of mainstream feminist thought, such as poor women, women of color, and lesbians.⁶ Reproductive justice moves away from the language of choice and autonomy because “the ‘right to choose’ means very little when women are powerless.”⁷ Additionally, taking cues from sociologist France Winddance Twine, I analyze surrogacy as a form of stratified reproduction.⁸ This refers to the concept that certain physical and social reproductive tasks vary based on class, race, ethnic, and global hierarchies.⁹

This essay attempts to follow the reproductive justice movement’s example of linking domestic reproductive justice to the global women’s movement.¹⁰ In this essay, I briefly introduce some leader countries in the international surrogacy market. I then explore whether reproductive justice is being achieved in the current marketplace. I introduce the reader to sociology literature on reproductive justice in the surrogacy market and briefly provide such suggestions about how law may be used as a tool to achieve such reproductive justice.

II. THE INTERNATIONAL SURROGACY MARKET

International surrogacy has gained popularity due to the lack of international restrictions on such arrangements and due to advances in

2. See Ross et al., *supra* note 1.

3. *Id.*

4. See Mallika Kaur Sarkaria, Comment, *Lessons From Punjab’s “Missing Girls”: Toward a Global Feminist Perspective on “Choice” in Abortion*, 97 Cal. L. Rev. 905, 940 (2009) (citing Loretta Ross, *What is Reproductive Justice?*, in REPRODUCTIVE JUSTICE BRIEFING BOOK 4, available at <http://www.protectchoice.org/downloads/Reproductive%20Justice%20Briefing%20Book.pdf>).

5. *Id.*

6. *Id.* at 934.

7. *Id.* at 940.

8. FRANCE WINDDANCE TWINE, *OUTSOURCING THE WOMB: RACE, CLASS AND GESTATIONAL SURROGACY IN A GLOBAL MARKET* 3 (2011).

9. *Id.*

10. See Cynthia Soohoo & Suzanne Stolz, *Bringing Theories of Human Rights Change Home*, 77 FORDHAM L. REV. 459, 498 (2008).

technology allowing for gestational surrogacy, rather than traditional surrogacy. In a traditional surrogacy arrangement, a surrogate becomes pregnant via artificial insemination by sperm from the intended father or a sperm donor.¹¹ A traditional surrogate carries her own genetically related child and agrees to give it up upon the baby's birth.¹² Gestational surrogacy, where there is no such genetic tie, has all but replaced traditional surrogacy.¹³ In a gestational surrogacy, an embryo is created with an egg and sperm from the intended parents (or from donor eggs and sperm) through the aid of ART. Such embryo is then transferred into the uterus of a genetically unrelated surrogate.¹⁴

International, or global, surrogacy is a booming business. Even with many countries prohibiting surrogacy arrangements, the market for international surrogacy is estimated to be six billion dollars annually worldwide.¹⁵ Some countries, such as India and Ukraine, wish to be seen as international surrogacy destinations by providing quality medical care for a low cost and attempting to provide the most legal protections for intended parents.¹⁶

A. India

India seems to be actively vying to be the international surrogacy capital. In 2002, India became the first country to explicitly allow commercial surrogacy.¹⁷ The Indian government provides tax breaks to hospitals treating international patients.¹⁸ India has state of the art medical facilities and technical capabilities, combined with lower costs than fertility tourists may experience in their home country.¹⁹ The Indian Council of Medical Research estimates that surrogacy is almost a \$450 million a year industry in India.²⁰ The Confederation of Indian Industry estimates that medical tourism, including surrogacy, will generate \$2.3 billion in annual revenue

11. Usha Regachary Smerdon, *Crossing Bodies, Crossing Borders: International Surrogacy Between the United States and India*, 39 CUMB. L. REV. 15, 17 (2009).

12. *Id.*

13. *Id.*

14. *Id.*

15. Smerdon, *supra* note 11, at 24.

16. *See generally id.*

17. *See* Audrey Gentleman, *India Nurtures Business of Surrogate Motherhood*, N.Y. TIMES, Mar. 10, 2008, at A9, available at <http://www.nytimes.com/2008/03/10/world/asia/10surrogate.html>.

18. This includes hospitals that provide surrogacy related services, such as egg removal and other related in vitro fertilization techniques relied upon for gestational surrogacy arrangements.

19. Smerdon, *supra* note 11, at 32.

20. *Id.*

by 2012.²¹ As of 2009, India had 350 facilities that offered surrogacy as a part of a broader array of infertility-treatment services, triple the number in 2005.²² In 2009, approximately 1,500 pregnancy attempts using surrogates were made at these clinics.²³ A third of those were made on behalf of parents from outside India who hired surrogates.

The typical surrogacy fee in India ranges from \$25,000 to \$30,000, a fraction of the cost of surrogacy in the United States. Of that amount, the surrogate is paid a small percentage of the total cost. The payment for the surrogate is estimated to be from \$2,500 to \$7,000.²⁴

Many surrogacy clinics in India have dormitory-like group homes that house surrogates for as long as they are pregnant. One famous clinic, the Akanksha Infertility Clinic in Anand, India, has two such homes where the pregnant surrogates live together, are provided meals, and are restricted in their daily movements.²⁵ As a part of the surrogacy agreement, intended parents cover the cost of the surrogates' room and board, which is approximately one hundred dollars per month.²⁶ Unless she has a doctor's appointment or permission to visit family, each surrogate spends most of her time in the group home.²⁷ Sociologist Amrita Pande interviewed 42 gestational surrogates from Akanksha Infertility Clinic, their husbands and in-laws, and the director of the clinic, Dr. Nayna Patel, between 2006 and 2008.²⁸ According to her reports, relatives are free to visit surrogates, but due to the costs of travel, many surrogates do not see their families while they are pregnant.²⁹ Surrogates have reported missing their children.³⁰ Some have also reported that not having to take care of their household or

21. Scott Carney, *Inside India's Rent-A-Womb Business*, MOTHER JONES (Mar./Apr. 2010), <http://motherjones.com/politics/2010/02/surrogacy-tourism-india-nayna-patel>.

22. These numbers are estimates and difficult to substantiate as there is no registry or any licensure required to operate a clinic that offers surrogacy services. See Shilpa Kannan, *Regulators Eye India's Surrogacy Sector*, BBC NEWS (Mar. 19, 2009), <http://news.bbc.co.uk/2/hi/business/7935768.stm>. See also Sarmishta Subramanian, *Wombs for Rent: Is Paying the Poor to Have Children Wrong When Both Sides Reap Such Benefits?*, MACLEAN'S (July 2, 2007), http://www.macleans.ca/article.jsp?content=20070702_107062_107062&page=2 (estimating that there were 600 IVF clinics in India in 2007 with over 200 offering surrogacy).

23. Subramanian, *supra* note 22.

24. *Id.*

25. See SCOTT CARNEY, *THE RED MARKET* 135-38 (2011) (noting that while the surrogates at the Akanksha Infertility clinic are not prisoners, they cannot leave either).

26. See Amrita Pande, *Commercial Surrogacy in India: Manufacturing a Perfect Mother-Worker*, 35 J. OF WOMEN IN CULTURE AND SOCIETY 969, 974 (2010).

27. According to Scott Carney's experience, the surrogates were in the group home almost all day, without the opportunity to go outside unless they had doctors' appointments. CARNEY, *supra* note 25.

28. See Pande, *supra* note 26, at 974.

29. *Id.*

30. *Id.*

do other work has been a welcome break.³¹

The payments that surrogates receive for carrying a baby often equals four or five times their annual household income.³² Although the payment is less than in other countries, such as the United States, the sum is significant in the lives of these surrogates. Surrogates state that the income allows them to provide education for their children or to purchase a home.³³

B. Ukraine

Ukraine has become an attractive destination for international surrogacy in recent years. Numerous surrogacy clinics operate in Ukraine and advertise the lax regulations and intended parent friendly policies as a selling point.³⁴ Because there is no regulatory body to track surrogacy in the country, it is hard to determine how many surrogacy arrangements take place each year in the country.³⁵ One news source recently reported 120 successful surrogate pregnancies in Ukraine in 2011.³⁶ The true number is likely much higher as surrogacy agencies do not have to report surrogacy arrangements.³⁷ In Ukraine, a surrogacy arrangement costs approximately "\$30,000 and \$45,000 for foreign parents . . . with \$10,000 to \$15,000 going to the surrogate mother."³⁸ Approximately half of the surrogacy

31. *Id.*

32. *Id.*

33. *Id.*

34. Numerous surrogacy agencies and brokers have websites that tout the advantages of pursuing surrogacy in Ukraine. See e.g., New Life Ukraine, Surrogacy – Advantages (2007), <http://www.ukraine-surrogacy.com/advantages> (noting some of the advantages of surrogacy in Ukraine including "[1]gestational surrogate mothers cannot legally keep the baby after delivery, [2]only the names of the intended parents are written on the birth certificate, [3]the cost of surrogacy and embryo adoption/egg donation is 60-70% less . . . than the cost of the same programs in the United States, [4]the availability of young, healthy egg donors and surrogate mothers, and [5]no waiting time for our clients."). Also, the site notes that "gender selection is legal in Ukraine." New Life Ukraine, Surrogacy – Sex Selection (2007), http://www.ukraine-surrogacy.com/Sex_selection.

35. See Ohla Zhyla, *More Women in Ukraine Want To Be Surrogate Mothers*, DAY WEEKLY DIGEST, Dec. 15, 2009, available at <http://www.day.kiev.ua/289226>. In this newspaper article, a representative of the Association of Reproductive Medicine of Ukraine estimated that there were around sixty couples utilizing surrogate mothers in 2009, and theorized that the numbers went down from an estimated 90 couples in 2007 due to hassles with several European couples not being granted passports for their babies to return to their home country. See *id.*

36. Claire Biggs & Courtney Brooks, *Ukraine Surrogacy Boom Not Risk-Free*, RADIO FREE EUROPE, June 4, 2011, http://www.rferl.org/content/womb_for_hire_ukraine_surrogacy_boom_is_not_risk_free/24215336.html.

37. Zhyla, *supra* note 35. He estimates that the number is likely thirty percent higher and predicts that the number will be forty percent higher in 2011 due to the opening of several large surrogacy clinics.

38. Biggs & Brooks, *supra* note 36.

arrangements in the Ukraine are for foreign couples.³⁹

C. United States

When one thinks about international surrogacy, it typically conjures up a scenario involving someone from a more developed country, such as the United States, Japan, or Germany, traveling to a less developed country, such as India or the Ukraine, to have a surrogate bear a child for them. Although this is a rapidly growing part of the surrogacy market, there are European, Asian, Middle Eastern, and Latin American couples that hire American gestational surrogates due to the illegality or unacceptability of surrogacy in their own country.⁴⁰ Sir Elton John and his partner, arguably the most famous reproductive tourists, recently made international headlines by traveling from their native England to California to commission a child using a gestational surrogate.⁴¹ Because England does not allow commercial surrogacy, Elton John chose California as his surrogacy destination. Despite the high costs for commercial surrogacy there, many regard California as “the nation’s hub for surrogate pregnancies with its well-established network of sperm banks, fertility clinics and social workers” and intended parent friendly regulations.⁴²

The United States is one of only a few countries that allow or even encourage surrogacy.⁴³ Each state has its own view of surrogacy, and after the New Jersey *Baby M* case⁴⁴ and its ensuing controversy, many predicted the case was the beginning of the end of surrogacy. The advent of gestational surrogacy technology has diminished some of the concern that existed during the time of the New Jersey *Baby M* case that the surrogate would refuse to give up the baby. In the last half-decade, gestational

39. Zhyla, *supra* note 35.

40. The United States has also long been an international destination for high quality health care with wealthy medical tourists seeking out renowned facilities such as the Cleveland Clinic and Massachusetts General Hospital for certain procedures. See Leigh Turner, ‘First World Health Care at Third World Prices’: *Globalization, Bioethics and Medical Tourism*, 2 *BIOsocieties* 303, 307 (2007).

41. See Laura Roberts & Nick Allen, *Elton John Uses a Surrogate to Become a Father for the First Time*, *THE TELEGRAPH*, Dec. 29, 2010, available at <http://www.telegraph.co.uk/news/celebritynews/8228152/Elton-John-uses-a-surrogate-to-become-a-father-for-the-first-time.html> (noting that the couple may have spent paid the California based surrogacy agency more than £100,000 for the transaction).

42. See Julie Watson, *Surrogacy Scandal Raises Questions On Regulation Woman Used Flawed System To Broker Babies, Dupe Couples*, *HOUS. CHRON.*, August 12, 2011 at A.

43. Many countries including Germany, Sweden, Norway, Italy, and Australia have banned all forms of surrogacy. France, Greece, Denmark and the Netherlands ban all commercial surrogacy. England allows surrogacy for married couples, but allows only reimbursement for genuine medical and pregnancy related expenses.

44. *In re Baby M*, 537 A.2d 1227 (N.J. 1988).

surrogacy rates in the United States have risen almost 400 percent.⁴⁵ Estimates compiled in 2010 suggest that 1,400 babies are now born via surrogacy in the United States each year.⁴⁶ Not only do a large number of Americans decide that surrogacy is the right option for them, but a sizeable number of international couples choose to utilize American surrogate mothers to give birth to their children as well. Currently, no regulatory body tracks exactly how many of the surrogate babies born in the United States are carried for international parents. However, recent accounts suggest that this is a growing portion of the surrogacy market in the United States. For example, one large surrogacy agency, the Center for Surrogate Parenting in Encino, California, reports that approximately half of its 104 births in 2010 were for international parents.⁴⁷

III. REPRODUCTIVE JUSTICE ISSUES RAISED BY THE INTERNATIONAL SURROGACY MARKET

This essay does not attempt an exhaustive analysis on the reproductive justice issues raised in the surrogacy market. I have written in detail about such concerns elsewhere, but aim to introduce the reader to certain concerns may exist. In the surrogacy context, it is often the least advantaged women who serve as surrogates to the most advantaged women. Although commercial surrogates are paid for their services, and this may provide them with the means to better afford necessities or luxuries that may not otherwise have been possible, the surrogacy marketplace does nothing to better the conditions in the societies or communities from which these surrogates come from. Thus, after they stop serving as a surrogate, women may not be able to afford healthcare services for themselves or their families.⁴⁸

Individuals seek international surrogacy services for panoply of reasons. Although intended parents seeking international surrogacy arrangements may be much more economically privileged than the surrogates they utilize,

45. In 2006, the Society for Assisted Reproductive Technology ("SART") estimated that the total number of surrogate mothers in the United States was 260. Lorraine Ali, *The Curious Lives of Surrogates*, NEWSWEEK, Mar. 29, 2008, available at <http://www.newsweek.com/2008/03/29/the-curious-lives-of-surrogates.html>. In 2008 SART estimated this number to be 1000. *Id.* However, the number is certainly higher than this because at least 15 percent of clinics do not report their numbers to SART. Furthermore, private agreements made outside an agency are not counted. Additionally, SART figures do not factor in pregnancies in which one of the intended parents does not provide the egg - for example, where a male couple will raise the baby. *Id.*

46. Nara Schoenberg, *Growing Number of Surrogates Carry Babies for Foreign Clients*, THE TIMES, 2011 WLNR 7629757 (April 19, 2011).

47. *Id.*

48. See FRANCE WINDDANCE TWINE, *OUTSOURCING THE WOMB: RACE, CLASS AND GESTATIONAL SURROGACY IN A GLOBAL MARKET*. 3 (2011).

it is important to note that those seeking surrogacy services often do so as a last resort.⁴⁹ A woman may seek such services because she could not become pregnant “naturally” or via ART. A person may also choose international surrogacy because domestic surrogacy is not available to her or him, either because it is generally outlawed or that it is not available to that particular person due to her or his single status or sexual orientation. In many cases, intended parents in the United States choose international surrogacy because domestic surrogacy is prohibitively expensive. Additionally, although infertility rates are consistent amongst races, in the United States, black women are much less likely to use ART or surrogacy than white women. In addition to concerns about surrogates, a reproductive justice framework requires us to analyze why such a discrepancy exists. It is important to consider the effect of high cost of such services, lack of insurance access, and/or cultural norms on populations that do not typically participate as intended parents in the surrogacy context. Due to these obstacles, international surrogacy remains an option only for the economic elite.

It is difficult to discuss international surrogacy without generalizing which women choose to become surrogates. Using a reproductive justice framework allows one to at least acknowledge that there are differences even among “typical surrogates.” In the United States, surrogates are typically married, between twenty-one and thirty-seven years old, a high school graduate, a stay-at-home mother, and dependent on her husband’s income.⁵⁰ From Amrita Pande’s studies in India, we learn that the typical surrogate in her study was poor, lives in a rural area, undereducated, married young, and lives in an extended family that includes her in-laws.⁵¹ The language and ideals of autonomy may not be as relevant to such a woman as it may be for a white, middle class woman that liberal feminism often speaks for.⁵² Such a woman may be much more interested in thinking of herself as part of a larger family than an individual.⁵³ Sociologist Amrita Pande argues that being a surrogate in India or similarly situated countries should be considered a form of labor or work, rather than an autonomous “choice.”⁵⁴ Pande notes that such work should be compared

49. There are certainly intended parents who make an affirmative decision to seek a surrogate. However, this seems to be a small percentage of the population of intended parents.

50. TWINE, *supra* note 48, at 33.

51. See Pande, *supra* note 26, at 974.

52. Cyra Akila Choudhury, *Exporting Subjects: Globalizing Family Law Progress Through International Human Rights*, 32 MICH. J. INT’L L. 259 (2011).

53. *Id.*

54. *Id.*

to the other job prospects women who become surrogates actually have.⁵⁵ Pande worries that the ethical critiques of surrogacy ignore the reality on the ground. In India, Ukraine, and even in the United States, women who serve as surrogates may not have the job or income opportunities we would like these women to have.⁵⁶ Although it may be morally preferable for women in such societies to have numerous options for earning an income, this is not reality. Often, the process of becoming pregnant, carrying a pregnancy to term, and raising children is not given value, because such work is seen as “women’s work.” However, the international surrogacy market currently is compensating women surrogates in a manner that allows them to make more income as a surrogate than most other jobs they would be qualified for.⁵⁷ Only women can be surrogates, and perhaps this is one of the few jobs where women face no competition from men. Arguably, unlike other jobs that are seen as “female” jobs, such as teachers and nurses, where the market devalues such work and thus those in such professions are paid less, surrogacy still fetches a relatively pretty penny. To be sure, educating women and getting them training for jobs that do not define them for their reproductive capabilities is a worthwhile goal. However, such a goal may not be mutually exclusive from the international surrogacy market.⁵⁸ One problem with this construct is that unlike other jobs, there is an age limit and a woman may safely carry a baby only a limited number of times without harming her own health.

IV. CONCLUSION

Using a reproductive justice framework, we should be concerned about how the surrogacy market affects the well being of other women in towns that have emerged as surrogacy centers. Women who choose not to become surrogates due to moral, health, societal or other concerns may be

55. *Id.*

56. Most men and women work outside the home due to financial necessity. Perhaps this should not be viewed as a harm given that paradigm. PEW RESEARCH CTR., AMERICA’S CHANGING WORKFORCE: RECESSION TURNS A GRAYING OFFICE GRAYER 24 (Sept. 3, 2009), available at <http://www.pewsocialtrends.org/files/2010/10/americas-changing-workforce.pdf> (stating that most men and women who work outside the home do so “because they need to financially support the family – the institution in which they place priority of focus, value, and responsibility.”).

57. See Pande, *supra* note 26, at 974.

58. One may argue that surrogacy does not fit the mold of most jobs. A surrogate is carrying a baby for another all day for almost ten months. She does not get vacation time, and under most contracts, she cannot choose to quit. However, this is not that different from many of the menial jobs that women who serve as surrogates in India, Ukraine, and the United States perform. One can think of surrogacy as a job that involve “shifts,” perhaps a one-year shift. Pande argues that viewing surrogacy as legitimate work may help lessen the stigma that surrogates face and also may help build in additional protections we expect for workers. *Id.*

disadvantaged by not participating in surrogacy arrangements and may feel pressure to do so. The availability of surrogacy in a small town such as Anand, India, may preclude other viable and positive forms of employment for women. Also, while those who engage in surrogacy are able to afford luxuries such as their own home and private education for their children; the status of women in general in these societies may not improve and may even diminish due to the stigma associated with surrogacy.

What is the role of law in assuring reproductive justice in the surrogacy in the global marketplace? Regulation has been suggested, but it may further restrict access to commercial surrogacy.⁵⁹ Additionally, regulation is slow and does not provide immediate solutions to the problems facing intended parents and surrogates engaging in surrogacy today. In areas such as commercial surrogacy, and other related innovated using assisted reproductive technologies, there is a long lag between innovation and regulation of such innovation. International surrogacy has both beneficial and harmful effects. In the next few years, international surrogacy will continue growing, and regulators and scholars will need to address this brave new world with thoughtful, nuanced responses. Global surrogacy should be analyzed using an intersectional analysis of race, gender, and class to best address how reproductive justice may be achieved in such as market.⁶⁰ This essay begins a discussion of how international surrogacy may be used to achieve reproductive justice both for surrogates and intended parents.

59. See Judith Daar, *Regulating Reproductive Technologies: Panacea or Paper Tiger?*, 34 Hous. L. Rev. 609, 639 (1997) (discussing the benefits of a lack of regulation of assisted reproductive technologies).

60. See ADRIEN KATHERINE WING, INTRODUCTION TO CRITICAL RACE FEMINISM: A READER 7-16 (Adrien Katherine Wing ed. 2003) (discussing how Critical Race Feminism constitutes a race intervention in feminist discourse, in that it necessarily embraces feminism's emphasis on gender oppression within a system of patriarchy).